SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

TABLE OF CONTENTS

*

I. *Prolegomena*

1. I have voted in favour of the adoption of the present Judgment in the case of *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*, whereby the International Court of Justice (ICJ) has ordered reparations for the damages suffered by Mr. A. S. Diallo (established in the previous Judgment on the merits, of 30 November 2010), as an individual, under the UN Covenant on Civil and Political Rights (Art. 13), and under the African Charter on Human and Peoples' Rights (Article 12 (4)), as well as under the Vienna Convention on Consular Relations (his right to information on consular assistance, under Article 36 (1) *(b)*). In the present Judgment, in determining the reparations due ultimately to Mr. A. S. Diallo, as a result of the damages he suffered (para. 57), the ICJ has rightly taken into account the experience of other contemporary international tribunals in the matter of reparations for damages.

2. Amongst those tribunals, of particular importance is the case law of the international tribunals of human rights (in particular that of the Inter-American and the European Courts of Human Rights), as I shall seek to demonstrate in the present separate opinion. Although I have agreed with the Court's majority as to the determination of reparations in the present Judgment, there are some points, not fully reflected in the reasoning of the Court, that I feel obliged to dwell upon in the present separate opinion, so as to clarify the matter dealt with by the Court, and the foundations of my personal position thereon. One of the key points concerns the position of individuals as subjects of contemporary international law, and, accordingly, as *titulaires* of the right to reparation for the damages they have suffered.

3. My reflections, developed in the present separate opinion, pertain to other points as well, at conceptual and epistemological levels, namely: *(a)* the subject of the rights breached and the subject of the right to reparations; *(b) neminem laedere*: insights on reparations from the "founding fathers" of the law of nations *(droit des gens)*; *(c)* the dawn of State responsibility and the rationale of duty of reparations; *(d)* an indissoluble whole: breach of international law and compliance with the duty of reparation for damages; *(e)* the centrality of the victims in human rights protection, and its implications for reparations, and the distinct forms of these latter; *(f)* assessment of the contribution of the case law of the international human rights tribunals (in particular that of the Inter-American and the European Courts of Human Rights); *(g) neminem laedere* and reparation for moral damage to individuals; and *(h)* the relevance of the rehabilitation of victims. The way will then be paved, in the epilogue, for the presentation of my concluding reflections on the matter.

II. The Subject of the Rights Breached and the Subject of the Right to Reparations

4. In its Judgment on the merits (of 30 November 2010) in the present case, the Court established the violations of the *rights* of Mr. Diallo "as an individual" (*I.C.J. Reports 2010 (II)*, p. 655, para. 34), namely, his rights under Article 13 of the UN Covenant on Civil and Political Rights, and under Article 12 (4) of the African Charter on Human and Peoples' Rights, in addition to his right to information on consular assistance under Article 36 (1) *(b)* of the Vienna Convention on Consular Relations[1]. This was the first time in its history that the Court established violations of human rights, under two human rights treaties, in addition to the relevant provision of the 1963 Vienna Convention.

5. The subject of the rights violated in the *cas d'espèce* was a human being, Mr. A. S. Diallo, not a State. Likewise, the subject of the corresponding right to reparation is a human being, Mr. A. S. Diallo, not a State. He is the *titulaire* of such right to reparation, and the beneficiary of the reparations ordered by the Court in the present Judgment. In the previous Judgment on the merits (of 30 November 2010) the Court referred to the reparation — in the form of compensation — "due to Guinea for the injury suffered by Mr. Diallo" (*ibid.*, p. 691, para. 161). The Court further referred to the compensation owed by the Democratic Republic of the Congo to Guinea "for the injury flowing from the wrongful detentions and expulsion of Mr. Diallo in 1995-1996, including the resulting loss of his personal belongings" (*ibid.*, p. 691, para. 163).

6. In the subsequent proceedings as to reparations (written phase only), Guinea referred repeatedly, in its Memorial of 6 December 2011, to the damages[2] or injuries[3] or harms[4] suffered by Mr. Diallo, to the discrimination[5] and arbitrariness[6] inflicted against him. It also referred to the Democratic Republic of the Congo's breaches of human rights obligations[7]. For its part, in its Counter-Memorial of 21 February 2012, the Democratic Republic of the Congo (DRC) acknowledged the injuries[8] or damages[9] suffered by Mr. Diallo. The two contending Parties thus agreed that reparations were here due to the victim, for the human rights violations he suffered. The *titulaire* of the rights breached, and the *beneficiary* of the reparations due, was the individual concerned, Mr. A. S. Diallo.

---

[1] *Merits, Judgment, I.C.J. Reports 2010 (II)*, resolutory points 2, 3 and 4 of the *dispositif*.
[2] Memorial of the Republic of Guinea, paras. 16 and 48, and cf. para. 63.
[3] *Ibid.*, paras. 35 and 47, and cf. para. 62.
[4] *Ibid.*, para. 24.
[5] *Ibid.*, para. 43.
[6] *Ibid.*, para. 61.
[7] *Ibid.*, para. 21.
[8] Counter-Memorial of the DRC, paras. 2, 4 and 1.05.
[9] *Ibid.*, paras. 1.05 and 1.44.

7. Accordingly, in its Memorial Guinea invoked a recent case from the inter-American system of human rights, concerning Haiti[10]. And, for its part, the Democratic Republic of the Congo, in its Counter-Memorial, invoked a series of decisions from the European and the Inter-American Courts of Human Rights and surveyed them[11], stressing their importance for the determination of "compensation for non-pecuniary damage suffered by individuals"[12]. The Democratic Republic of the Congo made a point of stressing that it deemed it fit to draw on the case law of the Inter-American and European Courts of Human Rights as the corresponding two regional systems of human rights protection

> "are the oldest and best developed in the world and which have abundant practice in fixing compensation to make good the non-pecuniary damage resulting from wrongful and prolonged detentions of physical persons by certain States. In the light of the jurisprudence of these two international courts, the Respondent will submit its own proposal to the Court regarding the amount of compensation which it considers reasonable and proportionate in relation to the non-pecuniary damage suffered by Mr. Diallo."[13]

8. In its present Judgment on reparations the Court has recalled its finding in its previous Judgment on the merits (*I.C.J. Reports 2010 (II)*, p. 691, para. 163) in the *cas d'espèce*, whereby the amount of compensation due to Mr. A. S. Diallo is based on the damage suffered resulting from his "wrongful detentions and expulsion" in 1995-1996 and the consequent "loss of his personal belongings" (Judgment, para. 11). The whole reasoning of the Court is developed on the basis of the damages suffered by Mr. A. S. Diallo, as established by it in its earlier Judgment on the merits (of 30 November 2010). In the present Judgment, the Court reiterates its position that the damages were done to Mr. A. S. Diallo, the individual victim (*ibid.*, para. 57), not to his State of nationality or origin.

9. The fact that the mechanism for dispute-settlement by the ICJ is, as disclosed by its *interna corporis*, an inter-State one, does not mean that the Court's findings, and its corresponding reasoning, ought to be invariably limited to a strict inter-State approach. Not at all; in their contents, cases vary considerably, and, throughout the last decades, some of them have directly concerned the condition of individuals. I have had the occasion to point this out in my separate opinion in the Court's recent Advisory Opinion on *Judgment No. 2867 of the International Labour Organization Administrative Tribunal upon a Complaint Filed against the International Fund for Agricultural Development* (*I.C.J. Reports 2012 (I)*,

[10] Memorial of the Republic of Guinea, para. 30.
[11] Counter-Memorial of the DRC, paras. 1.07-1.43.
[12] *Ibid.*, para. 1.47, and cf. para. 1.41.
[13] *Ibid.*, para. 1.07.

pp. 79-80, paras. 78-79), and I do so again in the present separate opinion in the *Diallo* case (Judgment on Reparations).

10. Notorious examples in that sense are provided, e.g., by the *Nottebohm* case *(Liechtenstein* v. *Guatemala)* (1955, on double nationality); the case concerning the *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands* v. *Sweden)* (1958); the case of the *Trial of Pakistani Prisoners of War (Pakistan* v. *India)* (1973); the *"Hostages"* (*United States Diplomatic and Consular Staff in Tehran (United States* v. *Iran)* case (1980)); the *East-Timor (Portugal* v. *Australia)* case (1995); the case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina* v. *Yugoslavia)* (1996); the case of *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria)* (1996); the case of *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* (2000); the three successive cases concerning consular assistance — namely, the cases *"Breard"* (*Vienna Convention on Consular Relations (Paraguay* v. *United States)* (1998)); *LaGrand (Germany* v. *United States of America)* (2001); and *Avena and Other Mexican Nationals (Mexico* v. *United States of America)* (2004); the case on *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* (Order of 2009); the case of *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)* (2010); the case of the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)* (2011); the case of the *Temple of Preah Vihear (Cambodia* v. *Thailand)* (Order of 2011); and the case of the *Jurisdictional Immunities of the State (Germany* v. *Italy)* (2010-2012).

11. The insufficiency, if not artificiality, of the exclusively inter-State outlook of the procedures before the ICJ has become manifest, in the light of the very nature of some of the contentious cases submitted to it. The same has been disclosed by the exercise of its advisory function, as illustrated by its last two Advisory Opinions, on the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (2010), and on *Judgment No. 2867 of the International Labour Organization Administrative Tribunal upon a Complaint Filed against the International Fund for Agricultural Development* (2012). Despite the limitations of the inter-State conception of its mechanism of operation, the Court can at least disclose its preparedness *to reason* in the light of the progressive development of international law, thus contributing to it, beyond the outdated inter-State outlook.

12. In effect, in the present *Diallo* case, the Court's Judgments on the merits (2010) and now on reparations clearly show that its findings and reasoning have rightly gone well beyond the straight-jacket of the strict inter-State dimension. There are circumstances wherein the Court is bound to do so, in the faithful exercise of its judicial function, in cases concerning distinct aspects of the condition of individuals. After all,

breaches of international law are perpetrated not only to the detriment of States, but also to the detriment of human beings, subjects of rights — and bearers of obligations — emanating directly from international law itself. States have lost the monopoly of international legal personality a long time ago.

13. Individuals — like States and international organizations — are likewise subjects of international law. A breach of their rights entails the obligation to provide reparations to them. This is precisely the case of Mr. A. S. Diallo; the present case bears eloquent witness of that, and of the limits imposed by contemporary international law upon State voluntarism. States cannot dispose of human beings the way they want, irrespective of their rights acknowledged in the *corpus juris* of the international law of human rights; if they breach their rights enshrined therein, they are to bear the consequences thereof, in particular the ineluctable obligation to provide reparation to the individual victims.

III. *Neminem Laedere*: Insights on Reparations from the "Founding Fathers" of the Law of Nations (*Droit des Gens*)

14. This duty of reparation has deep historical roots, going back to the origins of the law of nations: such duty was in fact in the minds of the "founding fathers" of our discipline, as disclosed by their classical writings which have survived the onslaught of time. The present *Diallo* case, unique in the history of this Court — as I pointed out in my separate opinion in its earlier Judgment on the merits (of 30 November 2010) — seems to provide an invitation to embark on the rescue of the earlier thinking on such duty of reparation. In effect, in his celebrated Second *Relectio de Indis* (1538-1539), Francisco de Vitoria made a proposition to the effect that "the enemy who has done the wrong is bound to give all this redress"[14]; there is a duty, even amidst armed hostilities, to make restitution (of losses) and to provide reparation for "all damages"[15].

15. One was here in the realm of *jus gentium*, the law of nations, of all peoples, wherein the right to redress was reckoned[16]. The rules of that emerging law of nations were to be "just and fitting for all persons"; the

[14] *Op. cit. infra* note 16, Appendix B: Francisco de Vitoria, *Second Relectio: On the Indians [De Indis]* [1538-1539], Oxford/London, Clarendon Press/H. Milford, 1934 [reed.], p. LV.

[15] *Ibid.*; and cf. Francisco de Vitoria, "Relección Segunda: De los Indios" [1538-1539], *Obras de Francisco de Vitoria — Relecciones Teológicas* (ed. T. Urdanoz), Madrid, BAC, 1955, p. 827.

[16] J. Brown Scott, *The Spanish Origin of International Law — Francisco de Vitoria and His Law of Nations*, Oxford/London, Clarendon Press/H. Milford, 1934, pp. 140, 150, 163 and 165.

damages caused by wrongful acts were to be assessed, in order to provide redress to those who suffered them, and restitution of the losses[17]. In de Vitoria's understanding, redress of wrongs was to take place in disputes between States, or between groups, or between individuals, i.e., in all sorts of disputes. He viewed the international community of (emerging) States as "co-extensive with humanity"; such redress corresponded, in his conception, to "an international need"[18].

16. Hugo Grotius, for his part, dedicated a whole chapter of his *De Jure Belli ac Pacis* (1625) to the obligation of reparation for damages (Book II, Chap. XVII)[19]. In his outlook, the "injured party" was not necessarily a State; he referred to distinct kinds of damage caused by breaches of "rights resulting to us", or from "losses suffered by negligence"; such damages or losses create an obligation of reparation[20]. In his conception of the *jus gentium*, the (emerging) law of nations, H. Grotius focused on the reasonable, on the dictates of the right reason, bearing in mind also the common needs and, ultimately, the universal human society.

17. Samuel Pufendorf, likewise, in his *Elementorum Jurisprudentiae Universalis — Libri Duo* (1672), asserted that whoever has caused damage by a wrongful act is bound "to make good" and "to restore as much as he contributed to the damage"[21]. In this duty of restitution, each one was bound to provide reparation for the damage he caused, "to restore the whole", on the basis of natural law[22]. In his work *On the Duty of Man and Citizen* (1673), Pufendorf pondered that one who has suffered loss or damage cannot live in peace with the wrongdoer, without compensation; hence the need of restitution. Natural law, attentive to the sociable *(sociabilis)*, condemned vengeance[23]. "Natural equity" set forth the "obligation to make restitution" for loss or harm done with malice or negligence[24].

---

[17] *Op. cit. supra* note 16, pp. 172 and 210-211.

[18] *Ibid.*, pp. 282-283; and cf. also, Association Internationale Vitoria-Suarez, *Vitoria et Suarez: contribution des théologiens au droit international moderne*, Paris, Pedone, 1939, pp. 73-74, and cf. pp. 169-170.

[19] H. Grotius, *De Jure Belli Ac Pacis* [1625], *Liber secundus, caput* XVII, The Hague, M. Nijhoff, 1948, pp. 79-82.

[20] *Ibid.*, pp. 79-80, paras. I and VIII-IX; and cf. H. Grotius, *Le droit de la guerre et de la paix* [1625], Paris, PUF, 2005 [reed.], pp. 415-416 and 418, paras. I and VIII-IX.

[21] S. Pufendorf, *Elementorum Jurisprudentiae Universalis — Libri Duo* [1672], Oxford/London, Clarendon Press/H. Milford, 1931 [reed.], pp. 264-265.

[22] *Ibid.*, p. 266.

[23] S. Pufendorf, *On the Duty of Man and Citizen According to Natural Law* [1673], Cambridge University Press, 2003 [5th printing], Book I, Chap. 6, pp. 56-57 and 60.

[24] *Ibid.*, pp. 58-59; and cf. S. Pufendorf, *Os Deveres do Homem e do Cidadão de Acordo com as Leis do Direito Natural* [1673], Rio de Janeiro, Liberty Fund/Topbooks, 2007 [reed.], Book I, Chap. 6, pp. 152-153 and 156.

18. For his part, Christian Wolff held, in his *Jus Gentium Methodo Scientifica Pertractatum* (1764), that whoever caused a loss or wrong "to a citizen or subject of another State" is "bound to repair it"; the same applies in the relations among nations, wherein "the loss caused should be repaired"[25]. Any international wrong — he added — entails the duty of reparation, or of restoration of the loss[26]. In his *Principes du droit de la nature et des gens* (1758), Wolff situated the duty to provide reparation for the damage caused in the realm of natural law thinking[27].

19. To the writings, on the subject-matter at issue, of Vitoria, Grotius, Pufendorf and Wolff, others could be added, such as the ponderation of Alberico Gentili (*De Jure Belli*, 1598) and of Francisco Suárez (*De Legibus ac Deo Legislatore*, 1612), as to the need of a legal system that would regulate the relations of the members of the universal *societas gentium*, and the approach pursued by Cornelius van Bynkershoek (*De Foro Legatorum*, 1721; *Questiones Juris Publici — Libri Duo*, 1737), in keeping on upholding a multiplicity of subjects of *jus gentium* (nations, peoples, persons). By and large, the attention to the common condition of humankind was proper to natural law, which, with the *recta ratio*, provided the basis for the regulation of human relations with the due respect for each other's rights[28]. The duty of reparation responded to an *international need*, in conformity with the *recta ratio* — whether the beneficiaries were States (emerging in their days), peoples, or individuals.

20. Subsequent to the works of Pufendorf and Wolff *(supra)*, international legal thinking embarked on the reductionist path of the *jus inter gentes* pursuant to a much stricter inter-State outlook. The juxtaposition of absolute State sovereignties led to the exclusion from that legal order of the individuals as subjects of rights *(titulaires de droits)*. At international level, the States assumed the monopoly of the condition of subjects of rights; the individuals, for their protection, were left entirely at the mercy of the discretionary intermediation of their nation-States. The international legal order thus erected — which the excesses of legal positivism attempted in vain to justify — excluded therefrom precisely the ultimate addressee of the juridical norms: the human being.

---

[25] C. Wolff, *Jus Gentium Methodo Scientifica Pertractatum* [1764], Oxford/London, Clarendon Press/H. Milford, 1934 [reed.], p. 162, paras. 318-319.

[26] *Ibid.*, pp. 408 and 425, paras. 789 and 821.

[27] C. Wolff, *Principes du droit de la nature et des gens* [1758], Vol. III, Caen, Presses Universitaires de Caen, 2011 [reed.], Book IX, Chap. VI, pp. 293-294 and 296, paras. II, IV and XIII.

[28] The *right reason* lies at the basis of the law of nations, being the spirit of justice in the line of natural law thinking; this trend of international legal thinking has always much valued the *realization of justice*, pursuant to a "superior value of justice". P. Foriers, *L'organisation de la paix chez Grotius et l'école de droit naturel* [1961], Paris, J. Vrin, 1987, pp. 293, 333, 373 and 375 [reed. of study originally published in: *Recueil de la Société Jean Bodin pour l'histoire comparative des institutions*, Vol. 15, Part II, Brussels, Libr. Encyclopédique, 1961].

21. The teachings of the "founding fathers" of the law of nations, however, never faded away. Successive grave violations of the rights of the human person (some on a massive scale) awakened human conscience to the need to restore to the human being the central position from where he had been unduly displaced by the exclusive inter-State thinking which prevailed in the nineteenth century. The reconstruction, on human foundations, as from the mid-twentieth century onwards, took, as conceptual basis, the canons of the human being as subject of rights *(titulaire de droits)*, of the collective guarantee of the realization of these latter, and of the objective character of the obligations of protection, and of the realization of superior common values. The individual came again to be perceived as subject of the right to reparation for damages suffered.

IV. The Dawn of State Responsibility and the Rationale of Duty of Reparation

22. In effect, as from the late nineteenth century, some jurists had the intuition to dwell upon reparation for international wrongs, even before the advent of the era of (contemporary) international tribunals. They wrote within distinct theoretical frameworks. One of the earlier jurists to do so was Dionisio Anzilotti. On the one hand, his views on the legal standing of individuals (acknowledged by him only in positive domestic law)[29] became promptly and wholly unacceptable, even in the emerging legal doctrine of his times; this was largely due to the gradual establishment of the direct contacts between individuals and the international legal order (as from, e.g., the pioneering case law of the Central American Court of Justice, 1907-1917, followed by the Advisory Opinion of 1928 of the Permanent Court of International Justice [PCIJ] on the *Jurisdiction of the Courts of Danzig*, 1928) and the gradual recognition of the access of individuals to international justice[30].

23. On the other hand, another concern expressed by Anzilotti, as to the duty of reparation of damages resulting from breaches of international law so as to preserve the integrity of the international legal order, seems to retain its contemporaneity, over a century later. In fact, already in 1902, in his book *Teoria Generale della Responsabilità dello Stato nel Diritto Internazionale*, he pondered, in his conceptualization, that a *viola-*

[29] D. Anzilotti, "La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers", *op. cit. infra* note 34, pp. 5-6 and 8.

[30] A. A. Cançado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos,* Bilbao, Universidad de Deusto, 2001, pp. 9-104; A. A. Cançado Trindade, *El Derecho de Acceso a la Justicia en Su Amplia Dimensión*, Santiago de Chile, CECOH/Librotecnia, 2008, pp. 61-407; A. A. Cançado Trindade, *The Access of Individuals to International Justice*, Oxford University Press, 2011, pp. 1-236.

tion of international law (ensuing from an anti-juridical fact, a *factum contra jus*) generates *responsibility*[31]; hence the need to cease that violation (in its effects) and to provide *reparation* for the *damage*[32]. And Anzilotti added that "il *neminem laedere* è norma giuridica fondamentale nei rapporti degli Stati come in quelli degl'individui [the *neminem laedere* is a fundamental juridical norm in the relations of States as in those of individuals]"[33].

24. Four years later, Anzilotti stressed that any "act contrary to international law" engages international responsibility[34]. To him, an "international illicit act" is an act which is "in opposition with the objective international law"; thus, "le caractère illicite d'un acte dérive toujours de son opposition avec le droit objectif"[35]. To him, the damage is always encompassed implicitly in the "anti-juridical character of the act"[36]. And he added, with insight, that

> "any act committed by a subject contrary to the rule [of law] entails an obligation to restore, in one form or another, the juridical position which that subject has disturbed.
>
> [A] violation of international juridical standards by a State bound by those standards thus gives rise to a duty to make reparation, which generally consists in the restoration of the juridical position that has been disturbed."[37]

25. In the following years, it became generally accepted that the duty of reparation was one of general or customary international law. Another international law theorist, Hans Kelsen, endeavoured in vain to challenge that. In 1932, dwelling upon reparation, he built his conceptualization within the straight-jacket of the exclusive *inter-State dimension*. He took an isolated position (already in those days) to the effect that the duty of reparation (compliance with which would in his view avoid recourse to force and retaliation or reprisals) would necessarily require a prior *agreement* between the States concerned[38]. Kelsen overlooked the general acknowledgement, discernible already in his times, that that duty was one of general or customary international law, and could not be entirely sub-

---

[31] D. Anzilotti, *Teoria Generale della Responsabilità dello Stato nel Diritto Internazionale*, Part I, Florence, F. Lumachi Libr.-Ed., 1902, pp. 75, 78 and 102-103.

[32] *Ibid.*, pp. 95-97 and 100-101.

[33] *Ibid.*, p. 99.

[34] He used indistinctly the terms "acte" and "fait de l'Etat"; cf. D. Anzilotti, "La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers", 13 *Revue générale de droit international public* (1906), pp. 292 and 296.

[35] *Ibid.*, p. 14.

[36] *Ibid.*, p. 13.

[37] *Ibid. [Translation by the Registry.]*

[38] H. Kelsen, "Unrecht und Unrechtsfolge im Völkerrecht", 12 *Zeitschrift für öffentliches Recht* (1932), pp. 481-608.

sumed under the will of individual States *tout court*. *Opinio juris communis* stood above the will of each State.

26. Yet, just as it happened with the theory of Anzilotti, in that of Kelsen there is a concern which seems to have subsisted to date, retaining its contemporaneity: reparation cannot "efface" the breach of international law already committed, but it can rather avoid the negative consequences of the wrongful act (i.e., recourse to force and reprisals on the part of the affected State). In Kelsen's own words, in dwelling upon reparation,

> "Ihr Sinn liegt nicht darin, dass durch sie — wie ihr Name sagt — ein begangenes Unrecht wieder 'gut' gemacht wird, denn dies ist unmöglich. Der einmal gesetzte Unrechtstatbestand kann nicht aus der Welt geschafft werden. Sondern ihr Sinn liegt darin, dass durch sie kraft Rechtens der Eintritt der Unrechtsfolge ausgeschaltet wird." [Its significance does not lie with the fact that through such reparation — as its name implies — a wrong that has already happened will be repaired, as this is impossible. The wrongful behaviour cannot be made to disappear from the world. Its significance lies with the fact that through it, pursuant to a rule, the onset of the consequences of the wrong is made impossible.][39]

27. Reparation, in Kelsen's outlook, would thus contribute not only to justice, but also to peace (a topic which was, later on, towards the end of the Second World War, to attract his attention[40]). In addition, he admitted that reparation (for material and immaterial damage) might take distinct forms[41]. On the obligation of reparation, the celebrated dictum of the PCIJ in the *Chorzów Factory* case (Judgment of 26 July 1927) did not escape his attention[42]. Without abandoning his inter-State approach, in his Hague Academy lectures of 1953 he conceded, as to the obligation of reparation, that "an international court must confine itself to finding that an international obligation has been breached and to ordering reparation for the injury caused"[43].

28. Despite the constraints of the traditional inter-State outlook, the rationale of reparation began to attract growing attention, and its con-

---

[39] *Op. cit. supra* note 38, p. 560.

[40] Cf. H. Kelsen, *Peace through Law*, Chapel Hill, University of North Carolina Press, 1944, pp. 71-124; and cf. H. Kelsen, *A Paz pelo Direito* [1944], São Paulo, Ed. Martins Fontes, 2011 [reed.], pp. 65-114.

[41] Cf. *op. cit. supra* note 38, pp. 555-560.

[42] Cf. *ibid.*, p. 550.

[43] H. Kelsen, "Théorie du droit international public", *Recueil des cours de l'Académie de droit international de La Haye*, Vol. 84, 1953, p. 96, and cf. p. 30. *[Translation by the Registry.]*

ceptual framework was gradually to take place. The PCIJ much contributed to that, in referring, in the aforementioned *Chorzów Factory* case, to the obligation of reparation as corresponding to a *principle of international law*, and as conforming an "indispensable complement" to the wrongful act, so as to efface *all the consequences* of this latter (i.e., the provision of full reparation). In effect, support to the duty of reparation came from distinct trends of opinion.

29. There were those who held, in the early twentieth century, that that duty originated in the postulates of natural law. Amongst those was Paul Fauchille, who, in 1922, lucidly pondered that the rules governing the international responsibility of States, as to reparations,

> "can be summed up in the natural law idea that any act causing injury to others obliges whoever is responsible for that injury to make reparation for it. This idea is applied in private law in the relations between individuals; there is no reason why it should not also be applied in the relations between nations and between nations and individuals."[44]

Depending on the circumstances of the cases, the duty of reparation for damages may thus be performed to the benefit of States, or else of individuals, whoever has been injured. Parallel to the trend of jusnaturalist thinking on the matter, there were also those who beheld the duty of reparation in all legal systems of (positive) law, without which those systems would simply not exist[45].

30. In any case, attention began to be turned to the situation of the victim, as beneficiary of reparation, and if there were treaties which provided for reparation, this was so — unlike what Kelsen had assumed — because such treaties acknowledged a pre-existing and well-established principle of *customary* international law to the same effect[46]. At the basis of this principle, found in all national legal systems, was the "philosophical idea" which "translates the natural law precept *'neminem laedere'*"[47]. Be that as it may, reparation was already widely acknowledged as a postulate of *customary* international law, whereby a *"prestation"* is owed by the wrongdoer to the victim, as a reparation for the harm done, and the victim has the corresponding right to claim it[48]. By the mid-twentieth century, it was possible to state, as Hildebrando Accioly did, that . . ."[t]he

[44] P. Fauchille, *Traité de droit international public*, Vol. I, Part I, Paris, Libr. A. Rousseau Ed., 1922, p. 515. *[Translation by the Registry.]*

[45] Cf., e.g., L. Reitzer, *La réparation comme conséquence de l'acte illicite en droit international*, Paris, Libr. Rec. Sirey, 1938, p. 30.

[46] J. Personnaz, *La réparation du préjudice en droit international public*, Paris, Libr. Rec. Sirey, 1939, pp. 53 and 60.

[47] *Ibid.*, p. 59. *[Translation by the Registry.]*

[48] L. Reitzer, *La réparation comme conséquence de l'acte illicite…, op. cit. supra* note 45, pp. 19, 23, 25, 48 and 213.

general principle of the duty of reparation for injury is accepted throughout the international order"[49].

31. Yet, there was a long way to go, in the progressive development of *reparation* for injuries resulting from international wrongs. The matter continued to be studied — as, in the era of the United Nations, in the long-standing work of the International Law Commission (mainly in the period 1956-2001) —, largely in the framework of the relations among States. With the gradual expansion of international legal personality (and capacity), ineluctably accompanied by the corresponding expansion of international responsibility, the need was felt to consider reparation for damages in other and distinct contexts, beyond that of the strict inter-State framework of dispute-settlement, which became conceptually unsatisfactory.

V. An Indissoluble Whole: Breach of International Law and Compliance with the Duty of Reparation for Damages

32. The domain of international responsibility is central to international law, as without international responsibility the international legal system would not exist. The duty of full reparation is the prompt and indispensable complement of an internationally wrongful act, so as to cease all the consequences ensuing therefrom, and to secure respect for the international legal order[50]. The duty of reparation within the realm of international responsibility is attached to subjectivity in international law, ensuing from the condition of being subject of rights and bearer of duties in the law of nations *(droit des gens)*[51]. The advent of the international law of human rights and of contemporary international criminal law has had the impact of clarifying this whole matter, leaving no doubts that individuals — no longer only States — are also subjects of rights and bearers of duties emanating directly from international law (the *droit des gens*)[52].

33. The treatment to be dispensed to reparations was only to evolve, and considerably so, with the advent of the international law of human rights, being ineluctably *victim-oriented* as it is. The imperative of compliance with the duty of reparation was not to be limited to the avoidance of sanctions or reprisals (as propounded by Kelsen, *supra*) at inter-State level. Beyond that advantage stood, in the domain of juridical epistemol-

[49] H. Accioly, "Principes généraux de la responsabilité internationale d'après la doctrine et la jurisprudence", *Recueil des cours de l'Académie de droit international de La Haye*, Vol. 96, 1959, p. 415. *[Translation by the Registry.]*

[50] C. Cepelka, *Les conséquences juridiques du délit en droit international contemporain*, Prague, Universita Karlova, 1965, pp. 15, 17-18, 21-22, 60-61 and 79.

[51] *Ibid.*, pp. 15 and 53.

[52] A. A. Cançado Trindade, *Evolution du droit international au droit des gens — L'accès des particuliers à la justice internationale: le regard d'un juge*, Paris, Pedone, 2008, pp. 1-187.

ogy, the imperative of the *realization of justice*. The original breach or violation of international law (irrespective of who committed it) came to be regarded as forming an *indissoluble whole* with the compliance with the duty of reparation (irrespective of who is its beneficiary).

34. This is so, irrespective of the circumstances of the case, as that imperative, in my understanding, touches on the foundations of international law. It was soon to meet with judicial recognition of the Hague Court (both the PCIJ and the ICJ). Thus, as early as in 1927-1928, in the [aforementioned] *Chorzów Factory* case, the PCIJ invoked a precept of customary international law, reflecting a fundamental principle of international law, to the effect that "the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention."[53] And the PCIJ added that such reparation "must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed"[54]. Furthermore — as I recalled in a recent dissenting opinion (in this Court's Judgment of 3 February 2012),

> "In the present case concerning the *Jurisdictional Immunities of the State*, (. . .) [t]he *State*'s obligation of reparation ineluctably ensues therefrom, as the 'indispensable complement' of those grave breaches. As the *jurisprudence constante* of the old PCIJ further indicated, already in the inter-war period, that obligation is governed by international law in all its aspects (e.g., scope, forms, beneficiaries); compliance with it shall not be subject to modification or suspension by the respondent State, through the invocation of provisions, interpretations or alleged difficulties of its own domestic law (*Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928, P.C.I.J., Series B, No. 15*, pp. 26-27; *Greco-Bulgarian "Communities", Advisory Opinion, 1930, P.C.I.J., Series B, No. 17*, pp. 32 and 35; *Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 167; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 44*, p. 24)." (*Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, p. 265, para. 241.)

35. The breach of international law and the ensuing compliance with the duty of reparation for injuries are two sides of the same coin; they form an *indissoluble whole*, which cannot at all be disrupted by an undue invocation of State sovereignty or State immunity. This is the view which I have sustained in my dissenting opinion in the recent case on the *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*

[53] *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 21.
[54] *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, pp. 29 and 47-48.

(Judgment, I.C.J. Reports 2012 (I)), and which I again sustain in the present Judgment of the *Diallo* case: the reparations are owed by the responsible State concerned to the individuals victimized, as illustrated, in my perception, by both cases. The individual right to reparation is well-established in international human rights law, as demonstrated by the considerable case law of the IACtHR and the ECHR on the matter.

36. Contemporary international tribunals cannot remain oblivious of such significant development in recent years. As I deemed it fit to warn in my aforementioned dissenting opinion in the recent Judgment on the *Jurisdictional Immunities of the State*, it would be without foundation to keep on claiming that the regime of reparations for breaches of human rights would exhaust itself at the inter-State level, "to the detriment of the individuals" concerned. After all, the individual victims of those violations "are the *titulaires* of the right to reparation", and

> "[a]n interpretation of the regime of reparations as belonging purely to the inter-State level would furthermore equate to a complete misconception of the position of the individual in the international legal order. In my own conception, 'the human person has emancipated herself from her own State, with the acknowledgement of her rights, which are prior and superior to this latter'." [55] (*I.C.J. Reports 2012 (I)*, p. 269, para. 252.)

Thus, the regime of reparations for human rights violations could not exhaust itself at the inter-State level, leaving the individual at the end without any reparation, and at the mercy of the entire discretion of the wrongdoing State.

37. The right of access to justice *lato sensu* encompasses not only the access to a competent tribunal (at national or international level), but also the right — and its exercise — to an effective remedy and the guarantees of the due process of law, so as to have one's case fairly heard and adjudicated upon. It further comprises the reparations owed to the victims (whenever they are due to them), in the full and faithful compliance with, or execution of, the judgments at issue. Thus properly conceptualized, the right of access to justice forms part of international protection itself.

38. In the present domain of reparations, as in others, contemporary international law, the *jus gentium* of our days, has at last liberated itself from the chains of statism. Human rights constitute a basic foundation of the international legal order, with the reassuring advent of the new primacy of the *raison d'humanité* over the *raison d'Etat*. States are aware that nowadays they are bound to respond for the treatment they dispense to

[55] A. A. Cançado Trindade, *The Access of Individuals to International Justice, op. cit. supra* note 30, p. 209; A. A. Cançado Trindade, *Evolution du droit international au droit des gens — L'accès des particuliers à la justice internationale: Le regard d'un juge, op. cit. supra* note 52, pp. 29 and 146.

human beings under their respective jurisdictions. The present *Diallo* case, decided by the ICJ on the basis of human rights treaties, bears witness of this reassuring evolution.

39. Within this humanized outlook, the *reparatio* (from the Latin *reparare*, "to dispose again") ceases all the effects of the breaches of international law (the violations of human rights) at issue, and provides satisfaction (as a form of reparation) to the victims; by means of the reparations, the law re-establishes the legal order broken by those violations — a legal order erected on the basis of the full respect for the rights inherent to the human person. The full *reparatio* does not "erase" the human rights violations perpetrated, but rather ceases all its effects, thus at least avoiding the aggravation of the harm already done, besides restoring the integrity of the legal order, as well as that of the victims.

40. One has to be aware that it has become commonplace in legal circles — as is the conventional wisdom of the legal profession — to repeat that the duty of reparation, conforming a "secondary obligation", comes after the breach of international law. This is not my conception; when everyone seems to be thinking alike, no one is actually thinking at all. In my own conception, breach and reparation go together, conforming an indissoluble whole: the latter is the indispensable consequence or complement of the former. The duty of reparation is a *fundamental* obligation, and this becomes clearer if we look into it from the perspective of the centrality of the victims, which is my own. The indissoluble whole that violation and reparation conform admits no disruption by means of the undue invocation, by the responsible State, of its sovereignty or its immunities, so as to evade the indispensable consequence of the international breaches incurred into: the reparations due to the victims.

VI. The Centrality of the Victims in Human Rights Protection, and Its Implications for Reparations

1. The Central Position of the Victims

41. International law itself, in recognizing rights inherent to the human person, disauthorized the archaic positivist dogma which purported, in an authoritarian way, to reduce those rights to the ones "granted" or "conceded" by the State. Contrariwise, the recognition of the individual as a subject of both domestic and international law comes at last to give an ethical content to the norms of both legal orders: domestic and international. It further acknowledges the need for all States, in order to avoid new violations of human rights, to answer for the way they treat human beings under their respective jurisdictions, and to provide reparation for

the harm done to them. Rights, being inherent to the human person, and anterior and superior to the State, are not reduced to those which the State is prepared to "grant" or "concede" to persons under its jurisdiction, at its sole discretion.

42. The subjects of rights and the beneficiaries of reparations *(supra)*, under human rights treaties, are the individuals. The *centrality* of their position in the present domain of protection is well-established. This responds to a true *need* of the international community itself, which seeks nowadays to be guided by superior common values. Such need was intuitively perceived and heralded, some decades ago, in the first half of the twentieth century, in a pioneering way, by André N. Mandelstam[56], Georges Scelle[57] and Charles de Visscher[58]. In our times, the growing acknowledgment, by the international legal order, of the importance of reparations to victims of human rights violations, is a sign of its maturity, even though there remains a long way to go, to take into other areas the contribution of the international law of human rights. In this way, the historical process of the *humanization* of international law, intuitively detected and propounded, some decades ago, by a generation of jusinternationalists with a humanist formation (such as, e.g., M. Bourquin, A. Favre, S. Sucharitkul and S. Glaser)[59], will keep on advancing[60].

43. In fact, no one would, in sane conscience, challenge today that individuals are subjects of rights and bearers of duties which emanate directly from international law, and that States which violate their rights are bound to provide them reparation for the damages. In recent decades, the international community itself has reckoned the *need* to provide protection to the rights of the human beings who compose it (grouped under distinct forms of socio-political organization, either the State or others),

---

[56] A. N. Mandelstam, *Les droits internationaux de l'homme*, Paris, Editions internationales, 1931, pp. 95-96, 103 and 138.

[57] G. Scelle, *Précis de droit des gens — Principes et systématique*, Part I, Paris, Libr. Rec. Sirey, 1932 (reimpr. CNRS, 1984), p. 48.

[58] Ch. de Visscher, "Rapport: 'Les droits fondamentaux de l'homme, base d'une restauration du droit international'", *Annuaire de l'Institut de droit international* (1947), pp. 3 and 9.

[59] Cf. M. Bourquin, "L'humanisation du droit des gens", *La technique et les principes du droit public — Etudes en l'honneur de Georges Scelle*, Vol. I, Paris, LGDJ, 1950, pp. 24-38; A. Favre, "Les principes généraux du droit, fonds commun du droit des gens", *Recueil d'études de droit international en hommage à Paul Guggenheim*, Geneva, IUHEI, 1968, pp. 369-390; S. Sucharitkul, "L'humanité en tant qu'élément contribuant au développement progressif du droit international contemporain", *L'avenir du droit international dans un monde multiculturel/The Future of International Law in a Multicultural World* (Colloque de La Haye de 1983, ed. R.-J. Dupuy), The Hague, Nijhoff/Académie de droit international de La Haye/UNU, 1984, pp. 418-427; S. Glaser, "La protection internationale des valeurs humaines", 60 *Revue générale de droit international public* (1957), pp. 211-241.

[60] Cf. A. A. Cançado Trindade, "International Law for Humankind: Towards a New *Jus Gentium* — General Course on Public International Law, Part II", *Recueil des cours de l'Académie de droit international de La Haye*, Vol. 317, 2005, pp. 19-27 and 269-282.

with particular attention to those — individually or in groups — who find themselves in a situation of special vulnerability.

44. Even if, in certain cases, the international legal capacity of some individuals undergoes certain contingencies in view of their juridical or existential condition (children, elderly persons, stateless persons, among others), this in no way affects the essence and fundamental unity of their legal personality. They remain subjects of rights emanating from the *jus gentium*, and their unaffected international legal personality is the concrete expression of their inherent dignity[61]. They cannot be mistreated by the holders of the public power of the State, and, in case they are, reparation is owed to them. The international legal personality of the human person and the protection of the law subsist intact, irrespective of his or her juridical or existential condition; and his or her personality imposes limits to the power of the State.

2. The Implications for Reparations

45. The implications of the international subjectivity of individuals for reparations due to them were to challenge the postulates of traditional doctrine of State responsibility, and in particular its unsatisfactory and artificial inter-State outlook. Thus, towards the end of the last century, in the mid-1980s, the Cuban jurist F. V. García-Amador criticized the traditional outlook (reminiscent of E. de Vattel) of international responsibility which viewed this latter as a "strictly 'inter-State' legal relationship"; he retorted that that traditional approach was not appropriate to deal with claims for reparations to damages to individuals, such as cases of unlawful detention followed by arbitrary expulsion[62]. The damage — he added — is done to the individual himself (and not to his State of nationality), who is subjected to the "unnecessary humiliation" of the expulsion[63].

46. In sum, it is a damage done to the human person and not to the State. It is that damage that is taken as "the measure" for the determination of the reparation due[64], i.e., the damage done to the individual concerned. It is incongruous to approach this matter from a strict "inter-State" outlook. In this respect, García-Amador rightly observed: "The artificiality, and consequently also the inconsistencies and contradictions, of the traditional doctrine become clearly apparent when one considers the criterion generally applied for measuring the reparation."[65]

---

[61] IACtHR, advisory opinion OC-17/02 (of 28 August 2002), on the *Juridical Condition and Human Rights of the Child*, concurring opinion of Judge Cançado Trindade, paras. 32-34.

[62] F. V. García-Amador, *The Changing Law of International Claims*, Vol. II, N.Y./London, Oceana Publs., 1984, pp. 560 and 584-586.

[63] *Ibid.*, pp. 563-564.

[64] *Ibid.*, p. 562.

[65] *Ibid.*

47. The UN International Law Commission (ILC) itself, in the 2001 Report on its work on the international responsibility of a State, saw it fit to recall, in addressing the obligation "to make full reparation for the injury caused by the internationally wrongful act", the possibility that

> "an internationally wrongful act may involve legal consequences in the relations between the State responsible for that act and persons or entities other than States. This follows from Article 1, which covers all international obligations *of* the State and not only those owed *to* other States. Thus State responsibility extends, for example, to human rights violations and other breaches of international law where the primary beneficiary of the obligation breached is not a State."[66]

The ILC thus expressly reckoned that the international responsibility of a State "may accrue directly to any person or entity other than a State, and Article 33 makes this clear"[67].

48. As disclosed by the present *Diallo* case, one is, in sum, faced with a damage done to an individual. He (and not his State of origin) is the subject of the rights breached, he suffered unlawful detention and arbitrary expulsion (from the State of residence), he is the subject of the corresponding right to reparation, and the beneficiary thereof. His case was originally brought before this Court by his State of nationality (in the exercise of diplomatic protection), but, in its decision on the merits (Judgment of 30 November 2010), the Court made clear that the applicable law was the international law of human rights, concerned with the rights of human beings and not at all of States. The *cas d'espèce*, further clarified in this regard by the present Judgment on reparations, bears witness of the reassuring historical process, presently in course, of the *humanization* of international law — as I have been pointing out and supporting since the 1990s[68].

---

[66] ILC, *Report of the International Law Commission on the Work of Its 53rd Session* (2001), N.Y., UN, 2001, p. 214.

[67] *Ibid.*

[68] Cf., to this effect, my earlier individual opinions in the IACtHR (1998 until 2003), namely: IACtHR, case *Castillo Petruzzi and Others* v. *Peru* (preliminary objections, judgment of 4 September 1998), concurring opinion of Judge Cançado Trindade, paras. 6-7; IACtHR, advisory opinion No. 16 of the *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (1 October 1999), concurring opinion of Judge Cançado Trindade, paras. 34-35; IACtHR, case of the *Haitians and Dominicans of Haitian Origin in the Dominican Republic* (provisional measures of protection, resolution of 18 August 2000), concurring opinion of Judge Cançado Trindade, para. 12; IACtHR, advisory opinion No. 17 on the *Juridical Condition and Human Rights of the Child* (28 August 2002), concurring opinion of Judge Cançado Trindade, paras. 66-67 and 71; IACtHR, advisory opinion No. 18 on the *Juridical Condition and Rights of Undocumented Migrants* (17 September 2003), concurring opinion of Judge Cançado Trindade,

49. This is the situation, how it stands, in the present *Diallo* case, resolved by the ICJ on the basis of the applicable treaties on the protection of the rights of the human person. In other and entirely distinct situations (e.g., in territorial and boundary matters, in the regulation of spaces, in diplomatic relations, among others) damage may be found to have been done to the State. And in yet other circumstances (e.g., in situations of armed conflicts), damage may be found to have been done to *both* the State and the human person. This is what happened, e.g., in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda) (Judgment, I.C.J. Reports 2005)*, wherein the Court, in recalling that a State responsible for international wrongful acts is under the obligation to make full reparations for the injury caused by those acts, added that, in the *cas d'espèce*, those acts resulted in injury done to the Democratic Republic of the Congo "and to persons on its territory" (*ibid.*, p. 257, para. 259)[69]. Circumstances vary from case to case; but at least they leave it clear that a strict inter-State approach to the State's compliance with the duty to provide reparation, irrespective of such circumstances, appears anachronistic and unsustainable.

3. The Distinct Forms of Reparation

50. It has been in the domain of international human rights protection that reparations have been reckoned as comprising, in the light of the general principle of *neminem laedere*, the *restitutio in integrum* (re-establishment of the prior situation of the victim, whenever possible), in addition to the indemnizations, the rehabilitation, the satisfaction, and the guarantee of non-repetition of the acts or omissions in violation of human rights. The duty of reparation, corresponding to a general principle, has found judicial recognition *(supra)*, and support in legal doctrine[70]. The duty of reparation for damages stands as the indispensable

---

paras. 27-28; there follow successive references to, and assertions of, the *humanization* of international law, in my other individual opinions in the IACtHR, also from 2004 to 2008. For earlier writings, likewise followed by subsequent ones to the same effect, cf., *inter alia*, A. A. Cançado Trindade, "A Emancipação do Ser Humano como Sujeito do Direito Internacional e os Limites da Razão de Estado", 6/7 *Revista da Faculdade de Direito da Universidade do Estado do Rio de Janeiro* (1998-1999), pp. 425-434; A. A. Cançado Trindade, "La Humanización del Derecho Internacional y los Límites de la Razón de Estado", 40 *Revista da Faculdade de Direito da Universidade Federal de Minas Gerais*, Belo Horizonte/Brazil (2001), pp. 11-23.

[69] And cf. also *I.C.J Reports 2005*, p. 278-279, paras. 342 and 344.

[70] Cf., *inter alia*, Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge University Press, 1994 (reprint), p. 233; J. A. Pastor Ridruejo, *La Jurisprudencia del Tribunal Internacional de La Haya — Sistematización y Comentarios*, Madrid, Edit. Rialp, 1962, p. 429; H. Wassgren, "Some Reflections on *Restitutio in Integrum* Especially in the Practice of the European Court of Human Rights", 6 *Finnish Yearbook of International Law*, Helsinki (1995), pp. 575-595.

complement of the breach of a conventional obligation of respect for human rights [71].

51. Contemporary doctrine has identified the aforementioned distinct *forms* of reparation *from the perspective of the victims*, of their claims, needs and aspirations. By the *restitutio in integrum* one seeks the re-establishment — whenever possible[72] — of the *statu quo ante*. The *rehabilitation* comprises all the measures — medical, psychological, juridical and others — to be taken to re-establish the dignity of the victims. The *indemnizations*, often and unduly confused with the reparation, of which they are but one of the forms, comprise the pecuniary sum owed to the victims for the damages (material[73] and moral or immaterial[74]) suffered. The *satisfaction* is linked to the purported aim to cease the effects of the violations, and the *guarantee of non-repetition* (of the breaches) discloses a preventive dimension.

52. Juridical concepts, while encompassing values, are a product of their time, and as such are not unchangeable. The juridical categories crystallized in time and which came to be utilized — in a context distinct from the ambit of the international law of human rights — to govern the determination of reparations were strongly marked by analogies with solutions of private law, and, in particular, of civil law *(droit civil)*, in the ambit of national legal systems: such is the case, e.g., of the concepts of material damage and moral or immaterial damage, and of the elements of *damnum emergens* and *lucrum cessans*. Such concepts have been strongly determined by a patrimonial content and interest — which is explained by their origin — marginalizing what is most important in the human person, namely, her condition of spiritual being[75].

53. The pure and simple transposition of such concepts onto the international level was bound to generate uncertainties and discussion. The criteria of determination of reparations, of an essentially patrimonial content (ensuing from civil law analogies), does not appear to me entirely adequate or sufficient when transposed into the domain of the international law of human rights, endowed with a specificity of its own. It is not surprising that, as from the early 1990s, the matter began to be reassessed

[71] Cf., *inter alia*, P. Reuter, "Principes de droit international public", 103 *Recueil des cours de l'Académie de droit international de La Haye*, Vol. 103, 1961, pp. 585-586; R. Wolfrum, "Reparation for Internationally Wrongful Acts", *Encyclopedia of Public International Law* (ed. R. Bernhardt), Vol. 10, Amsterdam, North Holland, 1987, pp. 352-353.

[72] In case of violation of the right to life, for example, restitution becomes impossible.

[73] Not seldom, in relation to this point, in practice, reference is made to *damnum emergens* and *lucrum cessans*.

[74] Which, in most cases, is determined by a judgment of equity.

[75] This is disclosed by the fact that even the moral damage itself is commonly regarded, in the classical conception, as amounting to the so-called "non-patrimonial damage". The point of reference still keeps on being the patrimony.

in the realm of this latter, at the United Nations[76], well before the endorsement by the UN General Assembly in 2005 of the "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law"[77], elaborated and adopted by the [former] UN Commission on Human Rights[78] (cf. *infra*).

54. The important point here to retain is that, in the ambit of the international law of human rights, the *forms* of reparation (*restitutio in integrum*, indemnizations, rehabilitation, satisfaction, guarantee of non-repetition) are to be necessarily approached *as from the perspective of the victims themselves*, keeping in mind their claims, their needs and aspirations. Reparations for human rights breaches are, in fact, directly and ineluctably linked to the condition of the victims and their next of kin, who occupy in it a central position herein. Reparations are to be constantly reassessed as from the perspective of the integrality of the personality of the victims themselves, bearing in mind the fulfilment of their aspirations as human beings and the restoration of their dignity[79].

55. It is crystal clear that the aforementioned 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparations is also ineluctably *victim-oriented*: it rightly pursues a victim-centred approach, envisaging the right to reparation as a right of the individuals victimized, entailing the corresponding duty to have justice done to the individuals victimized, what becomes fundamentally important in cases of grave breaches of their rights[80]. Under certain circumstances, next of kin or dependants of the direct victims may also

---

[76] Cf. Th. van Boven (special rapporteur), *Study concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms — Final Report*, UN/Commission on Human Rights, UN doc. E/CN.4/Sub.2/1993/8, of 2 July 1993, pp. 1-65; and cf. also: [Various Authors], *Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms* (Proceedings of the Seminar of Maastricht of 1992), Maastricht, SIM/Univ. Limburg, 1992, pp. 3-253. And cf., subsequently, M. C. Bassiouni (special rapporteur), *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms — Final Report*, doc. E/CN.4/2000/62, of 18 January 2000, pp. 1-11.

[77] UN General Assembly resolution 60/147, of 16 December 2005.

[78] By its resolution 2005/35, of 19 April 2005.

[79] It is significant that the IACtHR, in its judgment (of 27 November 1998) in the case of *Loayza Tamayo* v. *Peru*, has, besides the measures of reparation that it ordered, also rightly recognized the existence of a damage to the *project of life* (linked to satisfaction) of the victim, caused by her detention (in the circumstances in which it took place). Cf. IACtHR, case of *Loayza Tamayo* v. *Peru* (reparations), judgment (of 27 November 1998), Series C, No. 42, paras. 83-192, and joint separate opinion of Judges A. A. Cançado Trindade and A. Abreu Burelli, paras. 1-17.

[80] Cf. P. d'Argent, "Le droit de la responsabilité internationale complété? Examen des principes fondamentaux et directives concernant le droit à un recours et à réparation des

be regarded as "victims", entitled to make use of the right of access to justice.

56. The 2005 UN Basic Principles and Guidelines, at last adopted on 16 December 2005, were preceded by a unique and innovative jurisprudential construction of the IACtHR on this subject-matter (in particular on the distinct forms of reparation), which took place largely in the years 1998-2004, and which has been attracting growing attention of expert writing in recent years[81] (cf. *infra*). It can safely be stated that, in some respects, that jurisprudential construction of the IACtHR has, in its conceptualization, for the purposes of reparation, gone further than the 2005 UN Basic Principles and Guidelines, in fostering the expansion of the notion of victim, by encompassing as such the next of kin, also regarded as "direct victims" in their own right (given their intense suffering), without conditionalities (such as that of accordance with domestic law), in individualized as well as collective cases[82].

57. The centrality of the position of the victims, as *justiciables*, has implications for the approach to distinct forms of reparations. Let us take, as an example to illustrate this point, *satisfaction* as a form of reparation. Within the framework of strictly inter-State relations, satisfaction as a form of reparation has been met with criticism, given the susceptibilities surrounding the relations between States *inter se*[83]. However, in the framework of the relations between States and individuals under their

---

victimes de violations flagrantes du droit international des droits de l'homme et de violations graves du droit international humanitaire", 51 *Annuaire français de droit international* (2005), pp. 34-35, 40, 43, 45 and 52.

[81] Cf., e.g., [Various Authors], *Réparer les violations graves et massives des droits de l'homme: la Cour interaméricaine, pionnière et modèle?* (eds. E. Lambert Abdelgawad and K. Martin-Chenut), Paris, Société de législation comparée, 2010, pp. 17-334; M. Scalabrino, "Vittime e Risarcimento del Danno: L'esperienza della Corte Interamericana dei Diritti dell'Uomo", 22 *Comunicazioni e Studi*, Milan (2002), pp. 1013-1092; C. Sandoval-Villalba, "The Concepts of 'Injured Party' and 'Victim' of Gross Human Rights Violations in the Jurisprudence of the Inter-American Court of Human Rights: A Commentary on Their Implications for Reparations", *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (eds. C. Ferstman, M. Goetz and A. Stephens), Leiden, Nijhoff, 2009, pp. 243-282; K. Bonneau, "La jurisprudence innovante de la Cour interaméricaine des droits de l'homme en matière de droit à reparation des victimes des violations des droits de l'homme", *Le particularisme interaméricain des droits de l'homme* (eds. L. Hennebel and H. Tigroudja), Paris, Pedone, 2009, pp. 347-382; I. Bottigliero, *Redress for Victims of Crimes under International Law*, Leiden, Nijhoff, 2004, pp. 133-145; J. Schönsteiner, "Dissuasive Measures and the 'Society as a Whole': A Working Theory of Reparations in the Inter-American Court of Human Rights", 23 *American University International Law Review* (2007), pp. 127-164.

[82] A. A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional — Memorias de la Corte Interamericana de Derechos Humanos*, Belo Horizonte/Brazil, Edit. Del Rey, 2011, Annex IV, pp. 313-340.

[83] Cf., e.g., B. Graefrath, "Responsibility and Damages Caused: Relationship between Responsibility and Damages", *Recueil des cours de l'Académie de droit international de La Haye*, Vol. 185, 1984, pp. 84-87.

respective jurisdictions, satisfaction has proven to be a very appropriate form of reparation, and a particularly important one for the human beings, victims of breaches of their rights by the States at issue.

58. The reassuring centrality of the victims in human rights protection (an imperative of justice) has other implications as well, beyond the realm of reparations. It is not my intention to dwell upon them, as they lie beyond the scope of the present separate opinion. I shall limit myself to observing that the victims' central position has helped to awaken conscience as to their importance, and the corresponding need of honouring them, the victims. In our times, over the last decades, attention is at last turning from the past praises of the deeds of national heroes (including military and war heroes, conquerors and the like), to the memory of the silent victims, to the need to honour their suffering in enduring the violations of their fundamental rights, and to avoid dropping their suffering into oblivion[84].

59. In my dissenting opinion in the case on the *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)* (*Judgment, I.C.J. Reports 2012 (I)*, pp. 267-268, paras. 247-249), I have referred to endeavours, throughout the last decade, to secure reparations also to individuals, in the realm of international humanitarian law (e.g., the 2000 legal regime of the Ethiopia-Eritrea Claims Commission, the 2004 Report of the UN International Commission of Inquiry on Darfur, the 2010 Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues) of the International Law Association's International Committee on Reparation for Victims of Armed Conflict. There appears thus to be an ever-growing awareness nowadays of the individual victims' right to reparation, not only in the domain of the international law of human rights, but encompassing also the realm of international humanitarian law.

VII. The Contribution of the Case Law of the International Human Rights Tribunals (IACtHR and ECHR)

1. The Relevance of Their Case Law on Reparations Due to the Victims

60. In the light of all the aforesaid, the contribution of the case law of the international human rights tribunals (the IACtHR and the ECHR) is

[84] Cf., e.g., [Various Authors], *Commémorer les victimes en Europe — XVI^e-XXI^e siècles* (eds. D. El Kenz and F.-X. Nérard), Champ Vallon, 2011, pp. 10, 18, 25, 65, 144, 262 and 328-330.

noteworthy, and deserves particular attention for the consideration of the matter of the reparations due to victims of human rights violations. The growing case law of the IACtHR and the ECHR in recent years, on reparations to the victims of human rights violations, has contributed to shift attention to the victims, human beings (and not States), disclosing the centrality of their position in the present domain of protection (cf. *infra*). In this respect, the present *Diallo* case is a landmark in the evolving case law of the ICJ itself, as this latter has, for the first time in its history, established violations of rights enshrined into human rights treaties. The victim, the subject of rights and *titulaire* of the right to reparations, is a human being (and not a State), Mr. A. S. Diallo.

61. To him, and not to his State of origin or of nationality, reparations are due, pursuant to the human rights treaties at issue (the UN Covenant on Civil and Political Rights, and the African Charter on Human and Peoples' Rights). In determining those reparations, it is only too natural that the ICJ takes into due account the case law of the two human rights courts, in construction for many years, and which has further been invoked by the contending Parties themselves in the course of the present proceedings before this Court, namely, the Inter-American and the European Courts of Human Rights.

62. This is most reassuring, given the common mission of contemporary international tribunals of securing the *realization of justice*. Both the IACtHR and the ECHR have built a pioneering case law on the *condition of the victims* for purposes of reparation. The IACtHR has, moreover, much contributed to the evolution of the international law of human rights itself with its creative jurisprudential construction of the distinct *forms of reparation* (cf. *infra*). To the recently-established African Court on Human and Peoples' Rights a similar role is reserved[85], in the years to come.

63. In the first meeting ever, which brought together members and special guests of the three contemporary Human Rights Courts (held at the *Palais des Droits de l'Homme* in Strasbourg, on 8-9 December 2008, on the occasion of the 60th anniversary of the Universal Declaration of Human Rights)[86], one of the topics more extensively discussed, as I well

[85] In this respect, reference can be made to the practice, on reparations, of the African Commission on Human and Peoples' Rights; cf., *inter alia*, e.g., G. J. Naldi, "Reparations in the Practice of the African Commission on Human and Peoples' Rights", 14 *Leiden Journal of International Law* (2001), pp. 681-693.

[86] For accounts of the meeting, cf. A. A. Cançado Trindade, "Vers un droit international universel: la première réunion des trois cours régionales des droits de l'homme", XXXVI *Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano* (2009), Washington, D.C., Secretaría General de la OEA, 2010, pp. 103-125; Ph. Weckel, "La justice internationale et le soixantième anniversaire de la Déclaration universelle des droits de l'homme", 113 *Revue générale de droit international public* (2009), pp. 5-17.

recall, was precisely the experience accumulated by the IACtHR and the ECHR in the matter of reparations to victims of human rights violations, and the role reserved, from now onwards, to the three co-existing international human rights tribunals in the ongoing evolution of the international case law on the matter.

64. Other contemporary international tribunals have much to benefit from the experience gathered in this specific domain, in being attentive to it and taking it into due account. Parallel to this development, in the last two decades there have been endeavours to construct the practice of reparations also in the ambit of international humanitarian law[87]. Attention has thereby been turned, for the purposes of protection, to the *condition of the victims*, human beings, to the actual situation wherein they find themselves. The human person has thus gradually recovered the central place reserved to it in the contemporary international legal order, in the new *jus gentium* of our times. The growing jurisprudence on reparations for human rights violations bears witness of that.

2. The Contribution of the Inter-American Court of Human Rights

65. Reference has already been made to the unique and innovative jurisprudential construction of the IACtHR in the matter of reparations due to the victims of human rights violations (para. 56, *supra*). It has not passed unperceived in expert writing that the IACtHR has relied on the greater precision of the terms of Article 63 (1) of the American Convention on Human Rights[88] to construct its innovative and progressive case law on the matter[89]. To start with, the IACtHR has singled out the role of considerations of equity in setting forth the amounts of reparations due to individual victims, even in the absence of sufficient evidence (even more forcefully in certain cases where respondent States withheld their virtual monopoly of evidence).

66. Thus, for example, in the case of *El Caracazo* v. *Venezuela* (reparations, judgment of 29 August 2002), the IACtHR proceeded to the determination of compensation on the basis of equity, taking into account the suffering and "the alterations in the conditions of existence" of the victims and their next of kin (paras. 99-100). In the case of *Cantoral Benavides* v. *Peru* (reparations, judgment of 3 December 2001), the IACtHR

[87] Recent examples of the recognition of the right of individual reparation also in the domain of international humanitarian law, are provided in my dissenting opinion in the case of the *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, pp. 267-269, paras. 247-250.

[88] Cf. note 93, *infra*.

[89] Cf., to this effect, *inter alia*, e.g., G. Cohen-Jonathan, "Responsabilité pour atteinte aux droits de l'homme", *La responsabilité dans le système international* (Société française pour le droit international, colloque du Mans), Paris, Pedone, 1991, pp. 114 and 116.

also decided on the basis of equity (paras. 80 and 87). In my separate opinion in the case of *Cantoral Benavides* v. *Peru*, I pondered *inter alia* that

> "In the present judgment, the Inter-American Court extended the protection of the law to the victim in the *cas d'espèce*, in establishing, *inter alia*, the State's duty to provide him with the means to undertake and conclude his university studies in a centre of recognized academic quality. This is, in my understanding, a form of providing reparation for the damage to his project of life, conducive to the *rehabilitation* of the victim. The emphasis given by the Court to his *formation*, to his *education*, places this form of reparation (from the Latin *reparatio*, derived from *reparare*, 'to prepare or to dispose again') in an adequate perspective, from the angle of the integrality of the personality of the victim, bearing in mind his self-accomplishment as a human being and the reconstruction of his project of life." (Para. 10.)

67. In effect, the IACtHR has ordered a wide range of forms of reparation (*restitutio in integrum*, compensation, victim satisfaction, victim rehabilitation, acts of public apology, guarantees of non-repetition of human rights breaches), unparalleled in the case law of other contemporary international tribunals. In the recent cycle of cases of massacres[90] adjudicated by the IACtHR (cf., *inter alia*, e.g., *Aloeboetoe and Others* v. *Suriname* case, reparations, judgment of 10 September 1993; case of the *Massacre of Plan de Sánchez* v. *Guatemala*, reparations, judgment of 19 November 2004; case of the *Moiwana Community* v. *Suriname*, judgment of 15 June 2005; case of the *Massacres of Ituango* v. *Colombia*, judgment of 1 July 2006), the reparations ordered by the IACtHR have included health, housing, education and human development initiatives. In a distinct context, such measures of reparations were also ordered by the IACtHR in the paradigmatic case of the *Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua* (judgment of 31 August 2001), concerning the communal property of the members of an indigenous community. The IACtHR thereby indicated, in such cases, that the rehabilitation of victims (cf. *infra*) may also have a collective dimension, when it concerns the members of a given community.

68. In the leading case of the *"Street Children" (Villagrán Morales and Others)* v. *Guatemala* (reparations, judgment of 26 May 2001), the Court deemed it fit to warn that the obligation to make reparation is regulated, in all aspects (scope, nature, forms and determination of the beneficiaries) by international law; the respondent State "may not invoke provisions of its domestic law in order to modify or fail to comply" with that obligation (para. 61). The IACtHR has reiterated this warning in successive cases, e.g., its judgments on the cases of *Bulacio* v. *Argentina* (18 September

[90] For a recent study, cf. A. A. Cançado Trindade, *State Responsibility in Cases of Massacres: Contemporary Advances in International Justice* (Inaugural Address, 10 November 2011), Universiteit Utrecht, 2011, pp. 1-71.

2003, para. 72), of *Las Palmeras* v. *Colombia* (reparations, 26 November 2002, para. 38), of *Hilaire, Constantine and Benjamin and Others* v. *Trinidad and Tobago* (21 June 2002, para. 203), of *Trujillo Oroza* v. *Bolivia* (reparations, 27 February 2002, para. 61), of *Bámaca Velásquez* v. *Guatemala* (reparations, 22 February 2002, para. 39), and, earlier on, of *Suárez Rosero* v. *Ecuador* (reparations, 20 January 1999, para. 42). This point forms today part of its *jurisprudence constante* on reparations.

69. Still as to the forms of reparation, the IACtHR has ordered, for example, acts to honour the memory of victims, as in its judgments in the cases of *Bámaca Velásquez* v. *Guatemala* (of 22 February 2002, reparations), of *Myrna Mack Chang* v. *Guatemala* (25 November 2003), of the *Moiwana Community* v. *Suriname* (of 15 June 2005), of *Trujillo Oroza* v. *Bolivia* (of 27 February 2002, reparations), of the *Massacre of Plan de Sánchez* v. *Guatemala* (of 19 November 2004, reparations). In this last and dramatic case, those acts were to be accompanied (as they in fact were) by social programmes (rehabilitation) for the members of the affected community.

70. Furthermore, the IACtHR has also ordered, e.g., the public dissemination of the Court's decisions and/or of the result of the ordered investigations. It has done so in its judgments in the aforementioned cases of *Bulacio*, of *Bámaca Velásquez*, of *El Caracazo*, as well as in the cases of *Barrios Altos* v. *Peru* (14 March 2001), and of the *Juvenile Reeducation Institute* v. *Paraguay* (2 September 2004). Moreover, in its judgments in the aforementioned case of *Bámaca Velásquez* (merits, 25 November 2000, and reparations, 22 February 2002) as well as in that of *19 Merchants* v. *Colombia* (5 July 2004), the IACtHR dwelt upon the right to truth as a measure of reparation. In addition thereto, satisfaction as a form of reparation for damage to the victim's "project of life" was ordered by the IACtHR, in its judgments both in the aforementioned case of *Cantoral Benavides*, and in the case of *Loayza Tamayo* v. *Peru* (reparations, 27 November 1998). Last but not least, the guarantee of non-repetition of human rights breaches was ordered by the IACtHR in, *inter alia*, e.g., its judgments in the aforementioned case *Bulacio*, as well as in that of *Castillo Páez* v. *Peru* (reparations, 27 November 1998).

3. The Contribution of the European Court of Human Rights

71. Like the IACtHR *(supra)*, the ECHR has also pointed out the role of considerations of equity in the determination of the amounts of reparations due. Thus, for example, in the case of *Lupsa* v. *Romania* (judgment of 8 June 2006), the ECHR found that "deporting the applicant did objectively disrupt the management of his business", and that "the consequences of that disruption cannot be precisely quantified" (para. 70); it then ordered a sum on an equitable basis, to cover all heads of damage (para. 72, and cf. paras. 73-77). In the case *Assanidze* v. *Georgia* (judgment of 8 April 2004), concerning arbitrary detention, the ECHR ruled like-

wise on an equitable basis (para. 201, and cf. paras. 204-207), and awarded a lump-sum amount for all heads of (material and immaterial) damage, without setting out the reasons that led it to the specified amount (para. 201).

72. In the same line of thinking, in the case of *Orhan* v. *Turkey* (judgment of 18 June 2002), the ECHR decided, at the "level of just satisfaction", on the basis of considerations of equity (paras. 431-434, and cf. paras. 423-424). It did the same in the case *Lustig-Prean and Beckett* v. *United Kingdom* (judgment of 25 July 2000), as compensation, on an "equitable basis", for "emotional and psychological" disturbances (paras. 12 and 23). And again in the case *Selçuk and Asker* v. *Turkey* (judgment of 24 April 1998), the ECHR likewise awarded reparations for damages on the basis of equitable considerations (paras. 109-112, and cf. para. 106). And once more, in the *Delta* v. *France* case (judgment of 19 December 1990), the ECHR took its decision, of award of compensation, on an "equitable basis" (para. 43).

73. Parallel to such considerations of equity, as for the awarding of reparations itself, the case law of the ECHR has, however, never been as proactive as that of its sister institution across the Atlantic, the IACtHR. It has not disclosed the same creativity, and has in general been particularly cautious, in generally starting from predetermined categories of pecuniary and non-pecuniary damages, at times conveying the impression that compensation would better be left for national courts to decide[91]. The distinct drafting of the respective provisions on reparations of the European and the American Conventions on Human Rights, furthermore, conveys the impression that the phraseology of Article 41 of the European Convention[92] did not ascribe to the ECHR as wide a horizon for the determination of reparations than the one ascribed by Article 63 (1) of the American Convention[93] to the IACtHR; in any case, this is at least what the ECHR seems to have understood to date. It is thus not surprising to find arguments as to the need for the ECHR "to revisit"

[91] Cf., *inter alia*, e.g., L. Wildhaber, "Reparations for Internationally Wrongful Acts of States — Article 41 of the European Convention on Human Rights: Just Satisfaction under the European Convention on Human Rights", 3 *Baltic Yearbook of International Law* (2003), pp. 1-18.

[92] Article 41 (formerly Article 50) — on just satisfaction — of the European Convention states that: "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

[93] Article 63 (1) of the American Convention states that:

> "If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

its own case law on just satisfaction/*satisfaction équitable*, and in particular on reparation for moral (or "non-pecuniary") damages, so as to enlarge its horizon to the benefit of the *justiciables*[94].

VIII. *Neminem Laedere* and Reparation for Moral Damage to Individuals

74. In domestic legal systems, the whole theory of civil liability/*responsabilité civile* found inspiration in the fundamental principle *neminem laedere* (cf. *supra*). The conception of damage and of the reaction of the legal system to wrongful acts, requiring reparation, goes back to Roman law, to the theory of *id quod interest*, whereby the harmed person is entitled to redress. One restored thereby the balance or equilibrium needed in human relations. There was also concern to safeguard thereby human personality as such, the integrity of the human person. From ancient to modern times, unlike material damage, it proved particularly hard to conceptualize moral damage (*dommage moral*/non-pecuniary damage).

75. This latter became the object of endless discussions (ever since the first codifications), given the resistance of some doctrinal trends to attribute a value or price to the suffering of the victims *(pretium doloris)*. The prolonged construction of the theory of the *responsabilité civile* was made possible, however, by the recourse to general criteria, such as, e.g., the gravity of the breach, the intensity of the suffering it generated, the social repercussion of the breach, the consequences for the victim and the intentionality and *culpa* of the perpetrator.

76. The moral character of the damage was regarded as an infringement of the *human personality*, not only in what is most intimate to it but also in the human relations in its social milieu. It was against such damage that the legal system reacted, requiring reparation to the victim, so as to preserve the integrity of the human personality of the victim. Hence the conception of *responsabilité civile*, emanating from the immemorial general principle of *neminem laedere*. Such juridical construction was transposed from domestic law into international law, by means of private law analogies[95] (mainly of civil law). They were thereby heavily marked by a patrimonial content and interest (what can be explained by their origin). Hence their conceptualization, in civil law and also in common

[94] Cf., *inter alia*, e.g., P. Tavernier, "La contribution de la jurisprudence de la Cour européenne des droits de l'homme relative au droit de la responsabilité internationale en matière de réparation — une remise en cause nécessaire", 72 *Revue trimestrielle des droits de l'homme* (2007), pp. 945-966.

[95] E.g., the concepts of material and moral damages, the elements of *damnum emergens* and *lucrum cessans*, among others.

law countries, as "non-pecuniary damage"[96]. The point of reference was patrimonial or financial.

77. The simple transposition of such concepts to international law level was bound to raise uncertainties. Yet, at least it did not pass unnoticed, in the debates on the matter going back to the nineteenth century, that consideration of moral damages inevitably turns attention to human suffering[97], proper to human beings rather than to States. In fact, States do not suffer; not seldom, they tend to inflict suffering upon human beings under their respective jurisdictions or elsewhere. The importance of moral damages became manifest in face of the need of protection of individuals[98].

78. The analogies with solutions proper to common law or to civil law *(droit civil)* have never appeared convincing or satisfactory to me, as, by focusing — for the purpose of reparation — on the relationship of the human person with material goods, they marginalized the most important trait in the human person, as a spiritual being[99]. Moral damages should not be reduced to a consideration of material goods, patrimony, capacity for work, and the projection of these elements in time — as upheld by the regrettable cosmovision of the *homo oeconomicus* so widespread in our times. It was necessary to wait for the advent of the international law of human rights, in order to go beyond these short-minded categories, and look also into the human person's aspirations, freedom and integrity.

79. Juridical concepts, encompassing values, are the product of their time, and are open to progressive development. With the formation of the *corpus juris* of the international law of human rights, it became clearer that the determination of reparations should keep in mind the integrality of the personality of the victim, should consider the impact on this latter of the violation of the rights inherent to her, should approach the matter from an integral, rather than patrimonial or financial outlook, with special attention to the aspirations, personal freedom and integrity of the individual victim. Hence the importance of *restitutio in integrum* (not

[96] For comparative law surveys, cf., e.g., [Various Authors], *Damages for Non-Pecuniary Loss in a Comparative Perspective* (ed. W. V. Horton Rogers), Vienna, Springer-Verlag, 2001, pp. 1-311; [Various Authors], *Redress for Non-Material Damage/ Réparation du préjudice moral* (London Colloquy of 1969), Strasbourg, Council of Europe, 1970, pp. 4-127.

[97] Cf. R. André and A. Smedts, *La réparation du dommage moral*, Anvers, Impr. Dugardin & Persoons, [1951], pp. 6, 17 and 125, and cf. p. 10.

[98] L. Reitzer, *La réparation comme conséquence de l'acte illicite…, op. cit. supra* note 45, p. 124.

[99] In this respect, the 1948 American Declaration on the Rights and Duties of Man states, in its fourth preambular paragraph that: "Inasmuch as spiritual development is the supreme end of human existence and the highest expression thereof, it is the duty of man to serve that end with all his strength and resources."

always possible), given the manifest insufficiencies of indemnizations (for material damage).

80. On the basis of my own experience as magistrate serving successively two international jurisdictions, that of the IACtHR and then of the ICJ, I attribute particular importance to reparations for moral damages. In some cases of particular gravity, I dare to say that they prove to be even more significant or meaningful to the victims than those for pecuniary damages, or indemnizations. The granting of reparations for moral damages, by international human rights tribunals, has been made feasible by their recourse to considerations of *equity*. Given the prolongation of the proceedings of the *cas d'espèce* opposing Guinea to the Democratic Republic of the Congo, in the merits as well as the reparations stages (suggesting that the time of human justice is not the time of human beings), I have felt obliged to draw attention, in my declaration (*I.C.J. Reports 2011 (II)*, pp. 637-639, paras. 1-4) appended to the Court's Order of 20 September 2011 in the present *Diallo* case, to the relevance of the award of reparations within a reasonable time (as justice delayed is justice denied), as well as to the *considerations of equity* to bear in mind for the determination of reparations (mainly for moral damages).

IX. The Relevance of the Rehabilitation of Victims

81. The *reparatio* for damages comprises distinct forms of compensation to the victims for the harm they suffered, at the same time that it re-establishes the legal order broken by wrongful acts (or omissions) — a legal order erected on the basis of the full respect for the rights inherent to the human person. The observance of human rights is the *substratum* of the legal order itself. The legal order, thus re-established, requires the guarantee of non-repetition of the harmful acts. The *realization of justice* thereby achieved (an imperative of *jus cogens*) is in itself a form of reparation (satisfaction) to the victims. Such *reparatio* does not put an end to the suffering ensuing from the human rights violations already perpetrated, but, in ceasing the effects of those breaches, it at least alleviates the suffering of the individual victims (as *titulaires* of the right to reparation), by removing the indifference of the social milieu, the oblivion of the victims and the impunity of the perpetrators.

82. In this framework, the *rehabilitation* of the victims is of the utmost importance. It is a matter of not only re-establishing the legal order broken by wrongful acts (or omissions), but also of seeking to rehabilitate the victims themselves of such wrongs, as subjects or *titulaires* of the rights recognized therein that have been breached. After all, the individual victims (and not the States) occupy a central position in the framework of the international law of human rights, oriented towards them — which is

a law of protection *(droit de protection)*. By granting the individual victims *jus standi*, or else *locus standi in judicio*, in this domain of protection at international level, the international law of human rights has rescued the central position occupied therein by the victimized[100] (even in situations of great vulnerability, if not defencelessness), and has thereby asserted the (active) international subjectivity of individuals in the law of nations *(droit des gens)* at large.

83. The centrality of the victims in the present domain of protection draws attention to the pressing need of their *rehabilitation* — to be considered as from the integrality of the personality of the victims[101] — in the framework of *restorative* justice. The rehabilitation of the victims projects itself into their social milieu. It has both individual and social dimensions. Restorative justice has made great advances in the last decades, due to the evolution of the international law of human rights, humanizing the law of nations (the *droit des gens*). Such advances are now being felt, though in a lesser degree but a reassuring one, also in the domain of international humanitarian law and of contemporary international criminal law. The universal juridical conscience seems to be at last awakening as to the need to honour the victims of human rights abuses and to restore their dignity.

84. Rehabilitation of the victims acquires a crucial importance in cases of grave violations of their right to personal integrity. In effect, there have been cases where medical and psychological assistance to the victims has been ordered — mainly by the IACtHR — as a form of reparation, aiming at their rehabilitation[102]. Such measures have intended to overcome the extreme vulnerability of victims, and to restore their identity and integrity. Rehabilitation of the victims mitigates their suffering and that of their next of kin, thus irradiating itself into their social milieu.

85. Rehabilitation, discarding the apparent indifference of their social milieu, helps the victims to recuperate their self-esteem and their capacity to live in harmony with others. Rehabilitation nourishes the victims' hope in a minimum of social justice[103]. Rehabilitation helps to restructure the psyche of the victims, in their difficult quest for recovery from the injustice of humiliation. Rehabilitation as a form of reparation is intended to reorder ultimately the human relations disrupted by acts of cruelty,

[100] To this effect, IACtHR, case *Castillo Petruzzi and Others* v. *Peru* (preliminary objections, judgment of 4 September 1998), concurring opinion of Judge Cançado Trindade, paras. 5 and 12; IACtHR, case *Tibi* v. *Ecuador* (merits and reparations, judgment of 7 September 2004), separate opinion of Judge Cançado Trindade, paras. 16 and 18-20.

[101] A. A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, Vol. III, Porto Alegre/Brazil, S.A. Fabris Ed., 2003, p. 442.

[102] A. A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional ...*, *op. cit. supra* note 82, pp. 329-330.

[103] *Ibid.*, pp. 330-332.

in breach of human rights. In sum, rehabilitation restores one's faith in human justice.

X. Epilogue: Concluding Reflections

86. As we have seen in the present separate opinion, reparation and its rationale, in the light of the basic principle of *neminem laedere*, are deeply-rooted in international legal thinking, going back in time to the early beginnings of the law of nations (the *droit des gens*). Consideration of the subject-matter marked presence, as I have pointed out[104], in the writings of de Vitoria, H. Grotius, S. Pufendorf and C. Wolff (as well as in those of A. Gentili, F. Suárez and C. van Bynkershoek), from the sixteenth to the eighteenth centuries. Concern to secure *reparations for damages done to the human person* was present therein, and in a way even antedated their writings, going far back to the fifteenth century, when the term "person" (meaning the physical or moral person) had then been conceptualized[105], as referring to the subject of rights.

87. By then — and certainly by the following time of the insights of de Vitoria in the early sixteenth century, and of Suárez and Grotius in the early seventeenth century (followed by those of Pufendorf in the late seventeenth century, and of Wolff in the eighteenth century) — it had been understood that the human person "embodied" humanity, and a damage done to him/her was a *wrong*, which required reparation. The reductionist outlook which followed (starting with Vattel in the mid-eighteenth century) of an international legal order conformed in pursuance of a strict inter-State conception (in the light of distinct trend of legal positivism) — with individuals subjected to their respective States, as upheld mainly by Hegelian legal philosophy, as from the early nineteenth century, with its personification of the all-powerful sovereign State — with the disastrous consequences which followed, was incapable of removing the human person from the framework of the law of nations, as originally conceived.

88. As a matter of fact, even at the dark time when absolute State sovereignty (devoid of any precise meaning) came to be invoked, also in the ambit of the relations between States and individuals, to attempt to justify, and to cover-up, grave abuses against these latter, there were those who raised their voices to unmask such deception. Examination of this particular point lies beyond the purposes of the present separate

[104] Cf. Section III, paras. 14-21, *supra*.

[105] In ancient times, it may be recalled, the term *person* (the Etruscan *phersu*, the Greek *prôsopon*, the Latin *persona*) meant the mask, in theatrical representation; later on, it came to refer to the character *(personnage)*, paving the way for the medieval sense of "person" (the human person), meaning, from the fifteenth century onwards, the physical or moral person, as subject of rights.

opinion. Suffice it here only to recall that, in the early twentieth century, Léon Duguit, in his philosophical construction of the *"solidarisme de la liberté"*, outlining State obligations vis-à-vis the human person (individually or in groups), denounced the gross abuses perpetrated in the name of State sovereignty as unwarranted tyrannical oppression[106].

89. Throughout the twentieth century, despite so many abuses and successive atrocities victimizing millions of individuals, a trend of humanist thinking flourished, in the writings of Emmanuel Mounier (1905-1950) and Gabriel Marcel (1889-1973), asserting the juridical *"personalism"*, aiming at doing justice to the *individuality of the human person*, to her inner life and the need for transcendence (on the basis of her own experience of life). In a world of violence amidst the misuses of language, there were, thus, also those who succeeded in preserving their lucidity. This and other precious trends of humanist thinking, almost forgotten (surely by the legal profession) in our hectic days, can, in my view, still shed much light towards further development of reparations for moral damages done to the human person.

90. Such reparations for moral damages[107] should not be limited always to awards of reparations on a pecuniary basis only; there are times, depending on the circumstances of the cases, when they call for other forms of (non-pecuniary) reparations (obligations of *doing,* such as satisfaction and rehabilitation of the victims). Be that as it may, I dare to nourish the hope that the day will come when it is properly learned and well-established that the State's duty to provide reparations for damages it did to individuals is an ineluctable and indispensable one: it cannot, in my understanding, be evaded by an unacceptable, unethical and unfounded invocation of State sovereignty or of State immunity[108].

91. Another lesson we can extract from the present case, unprecedented in this Court's history, is that the determination of reparations for human rights breaches is not a matter of legal technique only, as the incidence of considerations of equity fully demonstrates. In this respect, also in the previous Judgment of the Court (on the merits, of 30 November 2010) in the present *Diallo* case, I pointed out, in my separate opinion thereon, that the individual concerned is the subject of the right to reparation and its ultimate beneficiary (*I.C.J. Reports 2010 (II)*, pp. 797-801, paras. 200-212), beyond the inter-State dimension (*ibid.*, pp. 802-805, paras. 213-221).

---

[106] He did so, e.g., in his lucid and thoughtful lectures of 1920-1921, as Visiting Professor at Columbia University; cf. Léon Duguit, *Souveraineté et liberté* [1920-1921], Paris, Ed. La Mémoire du droit, 2002 [reed.], pp. 126-127, 132-134, 150-151 and 202.

[107] Cf. Section VIII, paras. 74-80, *supra*.

[108] Cf., in this sense: case of *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, dissenting opinion of Judge Cançado Trindade, pp. 181-290, paras. 1-316.

92. As the Court stated in that Judgment on the merits of 30 November 2010, the *cas d'espèce* concerns breaches of human rights treaties (cf. *supra*). And as I pondered in my earlier separate opinion appended to that Judgment on the merits, the hermeneutics of human rights treaties has put limits to the excesses of State voluntarism (*I.C.J. Reports 2010 (II)*, pp. 755-758, paras. 82-88); it has done so in pursuance of the principle *pro persona humana* (*ibid.*, pp. 758-759, paras. 89-92). In a larger horizon, one is here guided by the principle of humanity (*ibid.*, pp. 759-762, paras. 93-105), in conformity with the *necessary* law of the *societas gentium*, regulating relations in the international community constituted by human beings socially organized in States and co-extensive with humankind (*ibid.*, pp. 762-763, para. 106).

93. As I deemed it fit to add in the aforementioned separate opinion, that necessary law of the *societas gentium* has — pursuant to natural law thinking — "prevailed over the will of individual States", thus remaining

> "respectful of the human person, to the benefit of the common good[109]. The precious legacy of natural law thinking, evoking the natural law of the right human reason *(recta ratio)*, has never faded away, and this should be stressed time and time again (. . .)." *(Ibid.)*.

Furthermore, the old monopoly of States of the titularity of rights at international level can no longer be sustained.

94. The reasserted presence — and a central one — of the individual in the framework of the law of nations has much contributed, as I have sought to demonstrate in the present separate opinion, to the more recent progressive development of international law in respect of reparations for damages ensuing from violations of human rights. With the rescue of the individual as subject of the contemporary *jus gentium*, the centrality of victims in the international protection of human rights is nowadays well-established and beyond question. In the present domain of protection, reparations are due to individual victims, and not to States. The victim-centred outlook has entailed implications for the reparations due, has clarified their forms, has fostered the progressive development of international law in the present domain.

95. The international subjectivity of individuals has had this additional beneficial impact upon contemporary *jus gentium*. The contribution of the case law of the international tribunals of human rights (the IACtHR and the ECHR) bears witness of this. The centrality of victims singles out, in particular, as we have just seen, the relevance, in particular, of reparation of moral damage to individuals, so as to alleviate their suffering, as well as of the rehabilitation of victims. The *realization of justice* is of key importance to the victims, and belongs, in my understanding, to the

[109] A. A. Cançado Trindade, *A Humanização do Direito Internacional*, Belo Horizonte/Brazil, Edit. Del Rey, 2006, pp. 9-14, 172, 318-319, 393 and 408.

domain of *jus cogens*. Without it, the right of access to justice *lato sensu*, there is no legal system at all.

96. The jurisprudential and doctrinal developments that I have cared, and felt obliged, to examine in the present separate opinion, have been made possible in the light of the recognition that the victims, subjects of the right to reparation, are the ones who actually suffered the damage — human beings of flesh and bone, and not their States. It is, furthermore, not to be forgotten that the legal construction on the matter, existing today in international law (but still in its infancy), was transposed to it from the secular experience gathered earlier in domestic legal systems; the recent contribution of international human rights tribunals (the IACtHR and the ECHR) sheds new light into it (cf. *supra*), and develops the aptitude on international law to regulate relations in circumstances such as those of the present *Diallo* case. The traditional and strict inter-State dimension is of little use, if any, here.

97. Furthermore, in modern times, since the dawn of State responsibility, it has become clear that the breach of international law and the compliance with the duty of reparation for damages form an indissoluble whole, which cannot at all be disrupted by undue and irresponsible invocations of State sovereignty or State immunity. The obligation to provide reparation of damages stands as a *fundamental* one, rather than as a "secondary" one. It is an imperative of justice.

98. The resurgence of individuals as subjects of the law of nations (the new *jus gentium*) has entailed other consequences, in addition to that on reparations for damages resulting from human rights violations *(supra)*, and related to this latter. It has, for example, called for a reassessment of issues pertaining to international legal procedure. This has been recently reckoned by this Court itself, in its most recent Advisory Opinion (of 1 February 2012) on *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*. In my separate opinion appended thereto, I sustained that the international legal personality (and capacity) of individuals, requiring the observance of the basic principle of procedural equality (equality of arms/*égalité des armes*), corresponds to a *necessity* of the international legal order itself in our days (*I.C.J. Reports 2012 (I)*, pp. 52-93, paras. 1-118).

99. Last but not least, I come back to my initial point. Bearing in mind that in the present case the damages were done to an individual (Mr. A. S. Diallo) and not to a State, there is one precision that I deem it fit to make at this final stage in this separate opinion. In the *dispositif* of the present Judgment, the Court fixes the amount of compensation for *non-material* as well as *material* damage "suffered by Mr. Diallo" (resolutory points (1) and (2)). I have concurred with the Court majority's decision as to a larger amount of compensation for non-material damage, given the particular importance that I attach to reparation for moral damages (cf. *supra*).

100. Although the amounts of compensation are formally due from the Democratic Republic of the Congo (as respondent State in the *cas d'espèce*) to Guinea (as complainant State in the present case), the ultimate subject *(titulaire)* of the right to reparation and its beneficiary is Mr. A. S. Diallo, the individual who suffered the damages. The amounts of compensation have been determined by the Court to *his benefit*. This is the proper meaning, as I perceive it, of resolutory points (1) and (2) of the *dispositif* of the present Judgment, in combination with paragraph 57 of the reasoning of the Court.

101. This understanding is well in accordance with the basic postulates of the international law of human rights (the applicable law in the present case), and bears witness of the international legal personality of the individual as subject of contemporary international law. This is clearly so, even if, out of a surpassed dogmatism, individuals remain deprived of their international legal capacity, of their *locus standi in judicio*, that would otherwise have enabled them — as it should happen, in the light of all the aforementioned — to appear directly in legal proceedings before this Court.

(Signed) Antônio Augusto CANÇADO TRINDADE.